United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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CASE CITED

STATUTE CITED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

-against-

JAMES GIACALONE,
Appellant.

Docket 74-1116

BRIEF FOR DEFENDANT-APPELLANT

STATEMENT

This is an appeal by James Giacalone from a judgment of conviction, after a jury trial, before Hon. Albert W. Coffrin in the Eastern District of New York.

Defendant-Appellant was convicted of the crime of conspiracy (Title 18, U.S. Code Sec. 371) in that he and others conspired to pass counterfeit money in violation of Title 18, U.S. Code Sec. 371. The original indictment in addition to the conspiracy count, contained nine substantive counts in which all of seven named, indicted conspirators, were indicted either jointly or severally. Eight of the substantive counts charged offenses involving counterfeit money. One count charged one of the indicted conspirators (not the appellant) with assaulting federal officers with a pistol. The appellant himself, in addition to conspiracy, was charged with three separate substantive crimes.

Immediately prior to the trial of the indictment, all of the six other defendants, including a defendant named Philip Stein, pleaded guilty to various counts of the indictment and the trial which proceeded against the appellant was severed as to all of the defendants who pleaded guilty.

At the conclusion of the government's case, the government moved to dismiss count number 5 of the indictment charging the appellant with the substantive crime of possession of counterfeit money. The appellant objected to the dismissal on the ground that the procedure of the government in moving to dismiss deprived him of a fair trial. Upon the submission of the case to the jury and following their deliberations they acquitted the appellant of the remaining two substantive charges and found the appellant guilty of only that count of the indictment which charged him with the crime of conspiracy, to count number 10 (A-27-28).

On January 23, 1974, Judge Coffrin sentenced the appellant to a term of imprisonment for three years.

ISSUES AND QUESTIONS INVOLVED

1. May the government in an opening statement to a jury, describe a crime committed by the appellant on separate dates, which encompassed the dates in which appellant was charged with conspiracy to commit the

of the count charging the appellant with possession of counterfeit money on January 4, 1972, that this Philip Stein sold counterfeit money to secret service agents on January 6 and 14, 1972, and that he got it from the appellant (A-3-4).

He further stated in his opening that he would call a ''person'' obviously meaning Philip Stein, who participated in the conspiracy and who would describe how he sold counterfeit money in January that he acquired from the appellant (A-5).

In the trial, testimony was adduced that a secret service undercover agent made a buy from Philip Stein on January 14, 1972, who was then arrested. (A-6 - A-8).

At a sidebar conference, counsel for the appellant asked for an assurance from the prosecutor that Philip Stein would be called as a witness. In stating his reasons for asking for that assurance, counsel made clear that he would withdraw his objection made to the introduction of the notes allegedly bought by the agent from Stein. The Government gave counsel that assurance (A8-10) The notes and the carton in which the notes were purchased from Stein on January 14, 1972, were described to the jury by the undercover agent (A-11 - 12).

The two substantive counts wherein the appellant was acquitted by the jury related to an undercover buy

made by the same undercover agent in October 1971 from one Julio Vale. The prosecutor never offered Vale as a witness even though Vale, too, had pleaded guilty before trial. The evidence connecting the appellant to these two buys was mainly circumstantial rather than direct.

The main evidence against the appellant on the conspiracy count came from an accomplice named Art Romell or Ruemmeley who was not indicted and who testified in detail to an operation where he, the appellant and others set up a counterfeit printing operation. This witness was arrested in June, 1972, at a time subsequent to the return of the indictment in the case at bar. He was charged with counterfeiting in the Southern District, pleaded guilty and thereafter became a government informer. This person, too, was mentioned in the opening statement as one who would give evidence against the appellant. He was subjected to a lengthy cross examination about his past criminal record, his past criminal proclivities and activities and his motives for testifying. A great deal of the defense summation attacked the testimony of the witness as to its credibility.

At the close of the government's case, the prosecutor moved for the dismissal of the count of the indictment which charged the appellant with passing counterfeit money to Philip Stein on January 4, 1972.

The motion was granted and the count was dismissed over the objections of defense counsel. Prior to the dismissal, the prosecutor stated that he decided not to call Stein as a witness (A-13 - 15).

The trial judge himself expressed concern in how to treat this matter as did the prosecutor. During the ensuing conversations amongst the court, prosecutor and counsel, the defendant continued to voice objections as to what had occurred (A16-26).

Following the close of the government's case, after making motions to dismiss the remaining counts, the appellant rested.

On the day of sentence, a motion to vacate the verdict on the ground that the failure of the government to offer proof in connection with Philip Stein prejudiced the defendant as to the remaining counts against him. This motion was denied. (A-29 - A-34)

THE STATUTE OR RULE INVOLVED

Rule 48(a) of the Rules of Federal Procedure, which deal with motions to dismiss an indictment, reads as follows:

> "By attorney for the Government.
> The attorney general or the United States attorney may by leave of the court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant." (Emphasis ours.)

ARGUMENTS

POINT ONE

THE ACTION OF THE GOVERNMENT IN DISMISSING A SUBSTANTIVE COUNT OF THE INDICTMENT IN THE POSTURE OF THE CASE AT BAR DEPRIEVED THE APPELLANT OF A FAIR TRIAL.

The only possible arguments that the government can make in opposition to this point are the very arguments made by the government at the time the appellant moved in the trial court to set aside the jury's verdict - that is (a) the government is entitled to make the determination not to present evidence against a defendant, and (b) that the appellant ought not complain since such a dismissal ''benefits the defendant'' and ''does not prejudice him in any way when counts are dismissed against him'' (sentencing minutes, Jan. 23, 1974, p. 9, A-34).

At first blush, it would appear that the persuasive logic of the government should prevail, since one who reaps a benefit by a dismissal of a count of an indictment (parenthetically - a count which calls for a 15 year sentence) ought not to be heard to complain. Out of context we would be forced to agree that this logic should be dispositive of the issue raised on this appeal. Such an argument however, calls for closer scrutiny in the posture of the case at bar.

Let us, therefore, submit to this honorable court the following indisputable facts that appear in the trial record which ought to overcome argument of the government and demonstrate that this appellant did indeed suffer grave prejudice by the tactics of the government.

1. The prosecutor in his opening told the jury that the government would show that the appellant conspired with several persons, including one Philip Stein.

2. The prosecutor further stated to the jury that he would show, in support of the count of the indictment charging appellant with possession of counterfeit money on a certain date, that this Philip Stein sold counterfeit money to secret service agents and that he, Stein, got it from appellant.

3. The prosecutor further stated that he would call a ''person,'' obviously meaning Stein, who participated in the conspiracy and who would describe how he sold counterfeit money in January, 1972 to an agent which he acquired from the appellant. (The two substantive counts of which the appellant was acquitted concerned transactions which took place on October 8, 1971.)

4. Evidence was adduced during the government's case by direct examination of a secret service agent that the agent made a buy of counterfeit money from Stein on January 14th, 1972 (A6-8).

5. At a sidebar conference, the prosecutor assured defense counsel that the money seized from Stein would be connected to the appellant through the testimony of Stein who would ''testify that he got the money from Giacalone.'' (A-10)

6. Following such colloquy, those notes obtained from Stein were marked for identification (A-11). The undercover agent testified that the notes marked for identification were the notes seized from Stein (A-11).

7. An attempt was made to show those notes to the jury which was objected to by defense counsel (A-12).

8. The government's motion to dismiss the ''Stein count'' was granted over the objections of the appellant.

Such are the undisputed facts.

Before turning to the main argument of ''prejudice,'' perhaps it is best that we attempt to put to rest the government's argument that the government had the right to move to dismiss the ''Stein count.'' Such an argument runs head on with Rule 48(a) that the government may not dismiss during the trial without the appellant's consent. U.S. v. Boiardo, 408 F2d 112. Herein, the appellant did not consent; indeed, he objected to the dismissal and the motion to dismiss was granted over his objections.

Now, to be perfectly candid, we would be willing to concede that such an irregular procedure, albeit contrary

to Rule 48(a) might be considered harmless as to appellant, in spite of his timely objection, if that were all there was to it. This might even be so if the prosecutor opened to the jury and simply read the "Stein count" without going into what evidence he claimed he would adduce to support it.

However, the record shows that the jury was told in an opening of the appellant's guilt, vis-a-vis his transaction with Stein, that the money seized from Stein was part of the same lot used in the money possessed by the appellant in the October transactions and in furtherance of the conspiracy. The jury actually saw this money although it was not received in evidence.

That the case was bitterly contested is evident from the record. The main thrust of the defense was to show that one informer called by the government was a liar and that because of his perjury, there was reasonable doubt as to appellant's guilt. We submit that the prosecutor recognizing such strategy, decided not to call the second informer, Stein though readily available lest cross examination show that he, too, was a liar. Additionally defense counsel had likewise been assured that he would testify. Surely, defense counsel prepared his defense accordingly, to the prejudice of the defendant.

Obviously, the verdict of the jury in acquitting the appellant of two substantive counts and finding him

guilty of conspiracy was a compromise verdict. Noone can say what weight the jury gave to this happening in their deliberations, if they gave it any weight at all. That it was there before them may have persuaded some of the jurors who were otherwise disposed to vote for acquittal to be convinced by others of the appellant's guilt.

We would also respectfully point out that this argument that the Stein count ought not to be dismissed and that the government should have adduced proof in support of that count and permitted cross examination of a government informer is not an afterthought sort of argument raised for the first time on this appeal. The objection was vigorously made on the trial at the time the government moved for the dismissal of the count. The appellant claimed prejudice then and claims it now.

One more thing ought to be said. Counsel for the government tried this case in the finest traditions of advocacy. We do believe and urge, however, that he made an error which seriously affected the appellant's right to a fair trial. It is immaterial, therefore, if the error was committed maliciously or innocently; the effect on the appellant was the same. The jury convicted him of a conspiracy after hearing improper evidence and argument that he was involved in a counterfeiting transaction at a time during the existence of the alleged conspiracy.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully submitted,

Albert E. Silbowitz
Attorney for Appellant

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 27 day of March, 1976 deponent served the within Brief upon U.S. Atty. Eastern Dist. of N.Y.

attorney(s) for Appellee

in this action, at 225 Cadman Plaza East Bklyn. N.Y.

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this
27 day of March, 1976

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976